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A Noble Sacrifice?

***Jus ad Bellum* and the International Community's Gamble in Chechnya**

PETER DANIEL DiPAOLA*

INTRODUCTION

On January 8, 1995, Grozny, the capital city of Chechnya,¹ once again lived up to its name: "Menacing."² Grozny had become a victim of war, and dead bodies littered its streets.³ Since 1783, when the Russians first invaded the Caucasus region, Chechens and Russians have engaged in periodic warfare;⁴ and despite the passing of 220 years, the same issue drives the current conflict: the Chechen people's resistance to Russian domination. Regrettably, each outbreak of violence has resulted in a great deal of human suffering; the recent fighting is no exception. Thousands of innocent people have died⁵ and many more have been displaced since the fighting began in 1994.⁶

Wars, like the conflict in Chechnya, have been a part of the international system since its inception, and for nearly as long thinkers have been pondering

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1. The Chechens refer to themselves as Nakhchuo or Nakhcho, and to Chechnya as the Nokhchijn Republika Ichkeriy [or as the Western papers have reported, the "Republic of Ichkeria." See, e.g. Michael Gordon, *Chechen Rebels Trying to Act as a De Facto Government*, N.Y. TIMES, Sept. 7, 1996, § 1, at 1]. CHRISTOPHER PANICO, CONFLICT STUD. No. 281, CONFLICTS IN THE CAUCASUS: RUSSIA'S WAR IN CHECHNYA 20 n.1 (1995). However, for the purposes of this Note and in light of common usage, the words "Chechen" and "Chechnya" will be used.

2. In Russian, Grozny means "menacing." PANICO, *supra* note 1, at 3.

3. Michael Specter, *Hundreds Killed in Chechen Strife*, N.Y. TIMES, Jan. 9, 1995, at A1.

4. See *infra* notes 29-35 and accompanying text.

5. In September 1996, Aleksander I. Lebed, the former Russian security chief, maintained that "about 80,000 people had been killed in the fighting and that some 240,000 had been wounded." Michael Gordon, *Chechnya Toll Is Far Higher, 80,000 Dead, Lebed Asserts*, N.Y. TIMES, Sept. 4, 1996, at A3.

6. In August 1996, "[t]he total number of displaced Chechens in Dagestan and Ingushetia . . . [stood] at more than 100,000." U.N. *Airlifts Emergency Supplies to Chechen Refugees*, Reuters World Service, Aug. 22, 1996, available in LEXIS, News Library, REUWLD File.

ways to prevent, or at least control, the fighting.⁷ The most well-known of the early attempts to impose controls on resorting to the use of force was the Christian Just War doctrine,⁸ but it was not until the Enlightenment that thinkers raised the issue of controlling the resort to war through international law.⁹ Over time, two distinct schools of thought developed with regard to the regulation of war: *jus ad bellum*, which addressed the international legal regulation on resorting to the use of force; and *jus in bello*, which contained the international legal rules of the conduct of war. In the 1940s, representatives of the international community attempted to codify the principles of *jus ad bellum* in articles 2(4) and 51 of the United Nations (U.N.) Charter.¹⁰ In 1986, the International Court of Justice (I.C.J.) declared that articles 2(4) and 51 represented customary international law.¹¹ As customary international law, these principles are binding on all States;¹² further, the I.C.J. has recognized them as *jus cogens*.¹³

In the case of Chechnya, the international community has applied the rules of war selectively. From the beginning of the conflict, world leaders have maintained that "(Chechnya) is an internal Russian affair,"¹⁴ and that Russia has the right to defend its territorial integrity.¹⁵ The U.N. has also adopted this stance. In an interview, then-U.N. Secretary General Boutros Boutros-Ghali stated, "[Chechnya] is a purely internal affair. . . . [in which the U.N.] can't get

7. See F.H. HINSLEY, *POWER AND THE PURSUIT OF PEACE; THEORY AND PRACTICE IN THE HISTORY OF RELATIONS BETWEEN STATES* (1963).

8. David Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 56 (1994). For a summary of the Christian Just War doctrine, see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY THE STATES* 4-18 (1963).

9. Fidler, *supra* note 8, at 56.

10. Article 2(4) prohibits the threat or use of force against other states, and article 51 defines self-defense and limits it to defending against an armed attack. See U.N. CHARTER art. 2, ¶ 4 and art. 51.

11. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 at 27, 92-96 (¶¶ 34, 173-180) (June 27). For a discussion on the effect of an I.C.J. ruling on the international community, see Louis Henkin, *Power and the Pursuit of Peace*, in *RIGHT VS. MIGHT* 37, 49-50 (1989).

12. Johnathan Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1 (1985).

13. *Military and Paramilitary Activities*, 1986 I.C.J. 14 at 100 (¶ 190) (stating that the rule against the use of force is "a conspicuous example of a rule in international law having the character of *jus cogens*.").

14. Charles Hecker, *Europe Condemns Slaying of Civilians*, MOSCOW TIMES, Jan. 5, 1995, available in LEXIS, News Library, MOSTMS File (statement by French Foreign Minister Alain Juppe).

15. Remarks at White House Conference on Trade and Investment in Central and Western Europe in Cleveland, Ohio, 31 WEEKLY COMP. PRES. DOC. 51, 54 (Jan. 13, 1995) [hereinafter Clinton Remarks].

involved. . . ."¹⁶ Even Helsinki Watch, a human rights organization, considers "Chechnya part of Russian territory."¹⁷ As a result, the international community has made no mention of *jus ad bellum*; and, while world leaders have expressed disapproval of the Russian army's apparent disregard for civilian casualties¹⁸ and asked Russian President Boris Yeltsin to pursue a peaceful settlement to the dispute,¹⁹ they have in no way treated the situation in Chechnya as inter-state conflict.

Despite almost universal international agreement on this point, I contend that the violence in Chechnya is not an internal matter. It is an international conflict to which the full scope of *jus ad bellum* and *jus in bello* should apply. By taking a different position, the international community is making a considerable gamble. They are wagering that the potential positive consequences of doing nothing (e.g., the continued development of Russian democracy and a stable Caucasus region) will outweigh the certain negative consequences (e.g., the undermining of the rule of law and the subjugation of the Chechen people). In this paper, I will argue that this gamble is an accurate portrayal of the situation by examining the Chechen conflict in the following manner. In Section I, I will discuss Chechnya's historical relationship with Russia and the events which led to the current conflict. In Section II, I will demonstrate how Russia has violated customary international law on *jus ad bellum*.²⁰ Finally, in Section III, having established that Russia's actions violated customary international law, I will address the reasons why I believe

16. *Larry King Live: Interview with Boutros Boutros-Ghali* (CNN television broadcast, Dec. 22, 1994), Transcript No. 1312, available in LEXIS, News Library, CNN File [hereinafter *Boutros-Ghali Interview*].

17. Steven Erlanger, *Behind the Bearhug: Chechnya's Case*, N.Y. TIMES, Dec. 22, 1994, at A14 (statement made by Aleksandr Petrov, head of Helsinki Watch's Moscow office).

18. Swedish Foreign Minister Lena Hjelm-Wallen stated, "What is happening is unacceptable. A civilized society does not solve conflicts in a way which leads to so much human suffering." Hecker, *supra* note 14. Likewise, other European countries such as France, Germany, Poland, and Britain, have spoken out against Russia's actions in Chechnya. *Id.* In the United States, President Clinton stated that "the violence must end," and he called on "the parties to stop spilling blood and start making peace." Clinton Remarks, *supra* note 15, at 54.

19. Steven Erlanger, *Clinton Writes Yeltsin on Grozny*, N.Y. TIMES, Aug. 22, 1996, at A8.

20. In this paper, I limit my discussion to *jus ad bellum*. Russia's violations of *jus in bello* are apparent and have been thoroughly discussed by other authors. For an excellent discussion of how *jus in bello* applies to Chechnya, see Duncan B. Hollis, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793 (1995). For discussion of specific *jus in bello* violations, see *Crisis in Chechnya: Hearings Before the Comm. on Security and Cooperation in Europe*, 104th Cong., 124-27 (1995) (Sergei Kovalev's Report to the Deputies of the State Duma); *Id.* at 77 (testimony of Amnesty International) [hereinafter *Hearings*].

the international community has not spoken out, and I will explain why the international community's inaction is a high stakes gamble.

I. THE CHECHEN CONFLICT

A. *History of Chechnya*²¹

Chechnya, located along Russia's southern border with Georgia, is mostly plains with the Caucasus mountains comprising only twenty percent of its territory.²² In 1989, 1.27 million Soviet citizens lived in the Chechen-Ingush Autonomous Soviet Socialist Republic (ASSR).²³ The majority of these inhabitants were not ethnic Russians; rather, they were Chechens, a distinct ethnic group who have lived in the mountains and plains of Chechnya since the first millennium B.C.²⁴ Unlike the Russian people, Chechens are not Slavs. They descended from the eastern branch of the Veinakh people and are closely related to the Ingush.²⁵ Further, the Chechens practice Sunni Islam²⁶ and speak a distinctive Caucasian language which is different from both the Slavic and the Turkish languages prevalent in the area.²⁷ In addition, the Chechen culture and traditions are different from those of the Russians.²⁸ Despite their dissimilarities, the two groups do have one thing in common: They share a bloody history of warfare and Russian subjugation.

In 1783, Tsarist Russia began a campaign into the Northern Caucasus in order to establish a link between mother Russia and the newly acquired Georgia.²⁹ This incursion set into motion a series of uprisings and revolts in Chechnya and the surrounding mountain republics. Continuous fighting

21. For a more detailed history of Chechnya's relationship with Russia and the Soviet Union, see Abdurahman Avtorkhanov, *The Chechens and the Ingush During the Soviet Period and Its Antecedents*, in THE NORTH CAUCASUS BARRIER: THE RUSSIAN ADVANCE TOWARDS THE MUSLIM WORLD (Marie Bennigsen Broxup ed., 1992).

22. PANICO, *supra* note 1, at 20 n.2.

23. *Id.* at 2. According to the 1989 survey, conducted before the collapse of the Soviet Union, the population the Chechen-Ingush ASSR was composed of 58% Chechens, 23% Russians, and 13% Ingush. The survey also found that 59% of the population was rural, largely Chechen and Ingush. *Id.*

24. V.B. Vinogradov & N.P. Gritsenko, *Chechen-Ingush Autonomous Soviet Socialist Republic*, 29 GREAT SOVIET ENCYCLOPEDIA 79 (Macmillian, Inc. trans., 1982).

25. PANICO, *supra* note 1, at 2.

26. *Id.*

27. *Hearings*, *supra* note 20, at 9 (statement of Mohammed Shashani, President, Chechen-Ingush Society of America).

28. *Id.*

29. PANICO, *supra* note 1, at 2.

marked the first eighty years of the Russian occupation.³⁰ Finally, in 1859 after a brutal campaign,³¹ the Russian army forced the leader of the resistance in the North Caucasus, Imam Shamil, to surrender. In spite of this victory, however, the Chechens were not willing subjects of the Russian empire. In 1894 a Russian study of the area found that the Chechens had not yet been "fully pacified."³²

On May 11, 1918, during the Bolshevik revolution in Russia, the North Caucasian people convened a Congress of the Union of Peoples of the North Caucasus. At this Congress, they elected a president and declared their independence.³³ By 1921, Bolshevik forces had crushed this new republic; but before its demise, Turkey, Germany, Austro-Hungary, and General Thompson in the name of the British government had all recognized it.³⁴ Under Communism, the relationship between the Chechens and their imperial rulers did not improve. On Red Army Day, February 23, 1944, Stalin forcibly deported all the Chechens and Ingush to Central Asia and dissolved the Chechen-Ingush ASSR.³⁵ During their exile, approximately twenty-five percent of the deported Chechens and Ingush died, many en route.³⁶

Finally, in 1957, the Soviet authorities allowed the Chechens and the Ingush to return, but they were now foreigners in their own homeland. The Chechens came back to find strangers in their homes,³⁷ and they became the victims of widespread job and educational discrimination.³⁸ Further, they were under-employed in the skilled trades and utilized primarily as migrant

30. *Id.*

31. Russian forces would enter the Chechen villages, while the men were in the mountains, kill the women and children, poison the wells, slaughter the stock, and burn the crops and houses. *Hearings, supra* note 20, at 9-10 (statement of Mohammed Shashani, President, Chechen-Ingush Society of America). See also Moshe Grammer, *Russian Strategies in the Conquest of Chechnya and Daghestan, 1825-1859*, in *THE NORTH CAUCASUS BARRIER: THE RUSSIAN ADVANCE TOWARDS THE MUSLIM WORLD* (Marie Bennigsen Broxup ed., 1992).

32. PANICO, *supra* note 1, at 3.

33. *Hearings, supra* note 20, at 10 (statement of Mohammed Shashani, President, Chechen-Ingush Society of America).

34. Marie Bennigsen Broxup, *Who are the Chechens?*, Crosslines: Global Rep., (1995) <http://carryon.oneworld.org/crosslines/crosslines_background.html>.

35. PANICO, *supra* note 1, at 3.

36. *Id.* at 4.

37. One such Chechen who returned to find his old home occupied by strangers was Dzhokhar Dudayev. In August 1991, while on leave in Grozny, Dudayev used this fact to demonstrate empathy with the Chechen nationalist cause, and subsequently, a group of Chechen elders elected him to lead the Chechen Pan-National Congress. STEVEN HANDELMAN, *COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA* 215 (1995).

38. PANICO, *supra* note 1, at 4.

farmers.³⁹ This discrimination continued until August 1991 when, under the leadership of Dzhokhar Dudayev, Chechnya declared its independence from Russia.

B. The Road to War

In August 1991, members of the Soviet government and the armed forces staged a putsch against then-Soviet President Mikhail Gorbachev. At that time, the head of the Communist apparatus in Chechen-Ingush ASSR, Doku Zavgayev, did not condemn the putsch. Instead, he adopted a wait-and-see approach.⁴⁰ On August 22, 1991 rallies took place in Grozny calling for the resignation of Zavgayev. Later, on September 6, national guard units under the control of Dzhokhar Dudayev stormed the pro-Communist Supreme Soviet in Grozny and shut it down.⁴¹ At first, Boris Yeltsin, who was leading the anti-putsch forces, greeted this news with enthusiasm because he viewed Zavgayev as a traitor.⁴² However, Yeltsin's opinion of events would change.

On October 27, 1991, Dudayev was elected Chechen President with eighty-five percent of the vote.⁴³ Five days later, on November 2, Chechnya declared independence from the Russian Federation, but Russia did not recognize Dudayev's election or Chechnya's declaration of independence.⁴⁴ Almost immediately, Yeltsin declared a state of emergency and sent 650 soldiers to Grozny with instructions to reimpose order.⁴⁵ However, when the soldiers arrived, Chechen militia troops surrounded the Russian camps and threatened to shoot anyone who left them. On November 11, a potential crisis

39. *Id.*

40. *Id.* at 5.

41. *Id.*

42. *Id.*

43. *Id.* at 7. The validity of this election was questioned both inside and outside Chechnya. *Id.* For other sources which maintain the vote was a fraud, see Andrei Fadin, *The War in Chechnya is Becoming Inter-Chechen*, OBSHCAYA GAZETA, Dec. 21-27, 1995, at 8 (condensed text), reprinted in CURRENT DIG. OF THE POST-SOVIET PRESS, Jan. 17, 1996, vol. XLVII, no. 51, available in LEXIS, News Library, CDSP File; Andrew Meier, *The Chechen Mafia: The Real Reason Yeltsin Invaded*, THE NEW REPUBLIC, Apr. 24, 1995, at 16; *Yeltsin Defends Russia's Action in Chechnya*, ROSSIISKAYA GAZETA, Dec. 29, 1994, at 1, reprinted in CURRENT DIG. OF THE POST-SOVIET PRESS, Jan. 25, 1995, vol. XLVI, no. 52, available in LEXIS, News Library, CDSP File [hereinafter *Justification Address*].

44. PANICO, *supra* note 1, at 7.

45. *Rebel Chechnya a Thorn in Russia's Flesh*, Reuters World Service, Dec. 1, 1994, available in LEXIS, News Library, REUWLD File [hereinafter *Thorn in Russia's Flesh*].

was avoided when the Russian parliament voted 177 to 4 to rescind the emergency order, and Yeltsin recalled the troops.⁴⁶

For the next three years, relations between Grozny and Moscow remained tense. Russia did not want to lose Chechnya for several reasons. First, Chechnya possesses great oil wealth and several important oil pipelines cross its territory. Second, its physical location in the Caucasus Mountains is strategically important. Third, Moscow feared setting a precedent which would lead to the secession of other Caucasus republics or other areas of the Russian Federation.⁴⁷ As a result of these interests, Russia imposed an economic, transport, and diplomatic blockade on Chechnya,⁴⁸ and it began to fund Chechen groups that opposed Dudayev. These groups were not hard to find because Dudayev's popularity had begun to wane. The economy of Chechnya was suffering horribly. Industrial production had fallen by more than seventy percent; and, despite the fact that all of Chechnya's oil revenue was staying in the country,⁴⁹ "not one new school, hospital, or factory was built" from 1992 to 1994.⁵⁰ Further, there was growing evidence of a link between Dudayev's government and organized crime. According to Salambek Khadzhiyev, a leader of the Round Table Opposition in Grozny in 1993, "The leadership here doesn't fight the criminal underworld, [because] it belongs to it."⁵¹

Because of these factors, in the spring of 1993, the Chechen parliament and the Grozny city council began to organize demonstrations against Dudayev.⁵² The Chechen President's reaction was swift. He sent government forces to storm the city council and disperse the demonstrators. Then, he issued a decree dissolving parliament. Finally, on June 3, 1993, he shut down Chechnya's constitutional court in retaliation for its ruling that his dismissal of parliament was unconstitutional, and the next day he canceled a referendum which had been scheduled to decide the issue of early elections.⁵³ Indeed,

46. Celestine Bohlen, *Legislatures Block Yeltsin Rule of Breakaway Area*, N.Y. TIMES, Nov. 12, 1991, at A10.

47. Michael Specter, *Russian Forces Move into the Rebel Region*, N.Y. TIMES, Dec. 12, 1994, at A1.

48. Vladimir Yemelyanenko, *Russia-Chechnya: A Forced Love Affair*, MOSCOW NEWS, Nov. 22, 1992, available in LEXIS, News Library, MOSNWS File.

49. Under Soviet control only 2% of Chechnya's oil revenue remained in the region. Meier, *supra* note 43, at 16.

50. *Id.*

51. HANDELMAN, *supra* note 37, at 221.

52. PANICO, *supra* note 1, at 8-9.

53. *Id.*

Dudayev's popularity was at an all-time low, and a split was forming in Chechnya between the lowland villagers who supported the parliament and the highland rural villagers who supported Dudayev.⁵⁴

Ironically, the Russians saved Dudayev's government by funding the armed opposition groups in Chechnya. Dudayev was able to build upon the people's fears that the Russians were trying to subvert Chechen independence, and the subsequent nationalist response boosted his popularity.⁵⁵ Undaunted, the Russians continued to support the opposition groups; and, while Moscow denied sending anything more than money and materials, it soon became apparent that Russian troops were actively participating in the fighting in Chechnya.⁵⁶ The crisis came to a head when Dudayev's forces captured at least seventy Russian soldiers after a botched armor attack on Grozny. Dudayev threatened to execute these men if Russia did not recognize its military involvement in Chechnya.⁵⁷ At first, the Russian government continued to deny that the men were active-duty Russian soldiers. However, on December 2, 1994, "the respected Russian daily *Izvestiya* in a front-page banner story provided incontrovertible evidence of the involvement of active-duty Russian soldiers recruited by the FSK [Federal Counterintelligence Service, the successor to the KGB]."⁵⁸ Finally, on December 4, 1994, Deputy Defense Minister Boris Gromov, in a letter to Dudayev, admitted that the Russian prisoners were Russian army soldiers, but denied official involvement.⁵⁹

Once Russian participation in the anti-Dudayev opposition had been exposed, Yeltsin adopted a stronger stance with regard to Chechnya. On November 29, 1995, he issued an ultimatum giving Dudayev forty-eight hours

54. *Id.* at 9; see also Fadin, *supra* note 43, at 20.

55. Jane Ormrod, *The North Caucasus: Confederation in Conflict*, in NEW STATES, NEW POLITICS: BUILDING THE POST-SOVIET NATIONS 104-05 (Ian Bremmer & Ray Taras eds., 1997).

56. PANICO, *supra* note 1, at 14. The appearance of M-24 gunships in Chechnya, helicopters that the opposition forces did not possess the crews to fly, was direct evidence of the Russian military's presence in Chechnya. *Id.*

57. Lawrence Sheets, *Chechnya Hints It May Execute "Russian Mercenaries,"* Reuters World Service, Nov. 28, 1994, available in LEXIS, News Library, REUWLD File. Dudayev stated, "If [Yeltsin] does not recognize these soldiers as prisoners of war they will be tried by the laws of shariat [Islamic law]. . . . There is only one sentence for mercenaries [death]." *Id.*

58. PANICO, *supra* note 1, at 15 (citing Sergei Mostovshchikov, *Lubyanka Verbovala Rossiiskikh Voennykh Diya Sekretnykh Operatsii v Chechni* [Lubyanka Recruited Russian Soldiers for a Secret Operation in Chechnya], IZVESTIYA, Dec. 2, 1994).

59. Margaret Shapiro, *Russia's Week of Blunders Baffles Kremlinologists*, WASH. POST, Dec. 5, 1994, at 29.

to disband his armed forces and release the prisoners.⁶⁰ This deadline passed unnoticed; and, after talks between Dudayev and Russian Defense Minister Pavel Grachev proved unfruitful,⁶¹ Yeltsin ordered Russian troops into Chechnya in order to protect “the integrity of Russia, [and] the safety of its citizens both in Chechnya and beyond its borders.”⁶² However, despite the importance of the operation, the Russian forces that pushed into Chechnya were ill-prepared to accomplish the mission. Their leaders were overconfident,⁶³ and the soldiers were poorly equipped, trained, and motivated.⁶⁴ As a result, they suffered heavy casualties; and, in an effort to compensate for these weaknesses, the Russians began to rely on heavy artillery and air attacks.⁶⁵ Regrettably, the Russian fire was largely indiscriminate; and, according to Sergei Kovalev’s Report to the Deputies of the State Duma, these attacks resulted in:

(a) large-scale death and maiming of the civilian population in Chechnya; (b) the destruction of housing and other civilian objects indispensable for survival; (c) damage to and disruption of medical institutions, the destruction of ambulances and other medical conveyances, including some marked with the Red Cross insignia; (d) the destruction of cultural objects; (e) serious damage to installations involving potential hazard to the environment.⁶⁶

60. PANICO, *supra* note 1, at 15. See also *Thorn in Russia's Flesh*, *supra* note 45.

61. PANICO, *supra* note 1, at 15.

62. *Text of Yeltsin's Address on Chechnya*, Reuters World Service, Dec. 11, 1994 (TASS News Agency trans.) available in LEXIS, News Library, REUWLD File [hereinafter *Invasion Address*].

63. PANICO, *supra* note 1, at 16.

64. Addressing the abysmal condition of the Russian troops in Chechnya, Aleksandr Lebed asserted “I suspect partisans in World War II were better clothed.” The Russian servicemen he encountered were “hungry, lice-infested and underclothed.” Alessandra Stanley, *Yeltsin Security Aide Denounces Russian War Effort in Chechnya*, N.Y. TIMES, Aug. 13, 1996, at A1. Indeed, at times Russian troops have been “forced to beg for food and melt snow on the wind-swept fields for drinking water.” Michael Specter, *10 Days That Shook Russia: Siege in the Caucasus*, N.Y. TIMES, Jan. 22, 1996, at A1. See also Sarah Koenig, *Word for Word/Russian Soldiers: All Disenchanted on the Chechen Front*, N.Y. TIMES, Sept. 8, 1996, § 4, at 7 (graphically illustrating Russian soldiers’ discontent and disillusionment with the war in Chechnya).

65. PANICO, *supra* note 1, at 16.

66. *Hearings*, *supra* note 20, at 125 (Sergei Kovalev’s Report to the Deputies of the State Duma).

Because of the high level of civilian casualties caused by indiscriminate fire and incidents like the Samashki massacre,⁶⁷ the Russian military alienated villagers who otherwise would have been indifferent to the Chechen nationalist cause.⁶⁸ These tactics swelled the ranks of Chechnya's partisan fighters who would continue to fight fiercely in the following years.

II. *JUS AD BELLUM*: THE RULES ON RESORTING TO WAR

A. *United Nations Charter: Articles 2(4) & 51*

After the carnage of World War II, the principal world powers sat down and drafted the U.N. Charter. The major purposes of the Charter were "(1) To maintain international peace and security . . . ; (2) To develop friendly relations among nations . . . ; (3) To achieve international co-operation in solving international problems . . . and in promoting and encouraging respect for human rights and for fundamental freedoms for all"⁶⁹ The founders of the U.N. Charter perceived the greatest threat to the achievement of these goals to be war. According to international legal scholar Louis Henkin, "[w]ar inflicted the greatest injustice, the most serious violations of human rights, and the most violence to self-determination and to economic and social development."⁷⁰ Therefore, in order to preserve peace, the founders of the U.N. Charter constructed an international security system, the backbone of which was articles 2(4) and 51. Article 2(4) states: "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁷¹ This provision completely outlawed the use of force between States subject to the very limited exception found in article 51. This article reads: "[n]othing in the present Charter shall impair the inherent right of individual or collective self-

67. On April 12, 1995, Russian troops entered the largely defenseless village of Samashki, which had tried to meet the Russian demands, and killed over 200 of its unarmed civilian residents. Dmitry Balburov, *Samashki Massacre Shows Grim Reality of War*, MOSCOW NEWS, Apr. 21, 1995, available in LEXIS, News Library, MOSNWS File; Steven Erlanger, *Dissent on Chechnya: Word to the West*, N.Y. TIMES, Apr. 21, 1995, at A6.

68. See Balburov, *supra* note 67.

69. U.N. CHARTER art. 1, ¶¶ 1-3.

70. Henkin, *supra* note 11, at 40.

71. U.N. CHARTER art. 2, ¶ 4.

defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”⁷² Unfortunately, after founding the Charter in 1945, the U.N. has experienced many problems in successfully implementing articles 2(4) and 51.⁷³ Nevertheless, articles 2(4) and 51 remain the international community’s primary regulation on *jus ad bellum*.

B. Prohibition on the Use of Force: Article 2(4) of the U.N. Charter

Notwithstanding the use of force in a “manner inconsistent with the Purposes of the United Nations,” two criteria must be met in order to violate article 2(4). First, both the actor and the entity against which force is used must be States.⁷⁴ Second, the actor must threaten or use force against the territorial integrity or political independence of a State. This second criteria sparked considerable debate as to what actions constituted a use of force. To help clear up this ambiguity, in 1974, the U.N. adopted a resolution on the definition of aggression⁷⁵ that spells out what State behavior would constitute an act of aggression and violate article 2(4). The resolution states that “[t]he first use of armed force by a State⁷⁶ in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression”⁷⁷ It then goes on to list specific acts of aggression. Of these acts, the most relevant to the case at hand are the following:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or

72. U.N. CHARTER art. 51.

73. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 34-46 (1993).

74. With regard to the actors, the text of article 2(4) says that “all members,” not States, shall refrain from the use of force. U.N. CHARTER art. 2, ¶ 4. However, the requirement of Statehood is more accurate because all members of the U.N. must be States (See U.N. CHARTER art. 4, ¶ 1), and article 2(6) dictates that article 2(4) can be enforced against non-member States. U.N. CHARTER art. 2, ¶ 6.

75. *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

76. An explanatory note to article 1 of the Resolution states that in this definition the term “state” “[i]s used without prejudice to questions of recognition or to whether a State is a member of the United Nations.” *Id.* at 143 (art. 2).

77. *Id.* (art. 2).

any annexation by the use of force of the territory of another State or part thereof;

* * *

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁷⁸

After the adoption of the *Resolution of the Definition of Aggression*, what constituted a “use of force” under article 2(4) became clearer. However, despite article 2(6) of the U.N. Charter, it was still uncertain whether the prohibition of the use of force enumerated in article 2(4) applied to all States. In 1986, the I.C.J. clarified this question in *Nicaragua v. U.S.* In this decision, the court stated that the prohibition of the use of force in article 2(4) reflects customary international law; therefore, it applies to all States⁷⁹ and constitutes *jus cogens*.⁸⁰ Consequently, despite the fact that Chechnya is not a member of the U.N., the prohibition on the threat or use of force contained in article 2(4) applies in its relations with Russia if Chechnya is a State, an issue that I address below.

1. *State Conflict or an Internal Affair?*

The first criterion for the application of article 2(4) is that both of the parties involved must be States. In the case at hand, Russia is clearly a State, but Chechnya’s status is far from obvious. Currently, international legal theory recognizes two primary tests to determine whether an entity like Chechnya is a State. These two tests are the constitutive and the declaratory theories of statehood.⁸¹

78. *Id.* (art. 3, ¶ a, art. 3, ¶ g). The I.C.J. stated that article 3(g) “may be taken to reflect customary international law.” *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 93 (June 27).

79. *Military and Paramilitary Activities*, 1986 I.C.J. at 17, 82-86.

80. *Id.* at 91-92. Many commentators have criticized the I.C.J.’s decision that art. 2(4) represents customary international law. See Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of Its Best Friends*, 27 HARV. INT’L L.J., 599, 620 (1986); Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101 (1987); Thomas M. Franck, *Some Observations on the ICJ’s Procedural and Substantive Innovations*, 81 AM. J. INT’L L. 116 (1987).

81. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 244 (3d ed. 1993).

According to the constitutive theory, an entity is not a State unless other States have recognized it.⁸² Under this theory, Chechnya obviously does not qualify for statehood because no State has recognized it since its declaration of independence in 1991.⁸³ Unlike the constitutive theory, however, the declaratory theory is not centered around recognition by other States. Instead, according to this theory, a State must satisfy four criteria: "a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States."⁸⁴ In the case of Chechnya, each of these four criteria will be examined.

First, Chechnya possesses a permanent population. The Chechen people have lived in the territory claimed by the Dudayev government for thousands of years.⁸⁵ Further, they make up a majority of the population,⁸⁶ and they do not identify themselves as Russians.⁸⁷ Rather, they have continually fought for their own independence, and view themselves as a separate people.⁸⁸

Second, with regard to defined territory, international law does not prescribe a minimum required area.⁸⁹ In addition, when the U.N. granted Israel membership, it gave credence to Philip C. Jessup's argument that in order to have territory, an entity was not required to have definite or fixed borders.⁹⁰

82. *Id.*

83. Despite the fact that no country has officially recognized Chechnya, both Saudi Arabia and Kuwait have offered to establish diplomatic relations with Chechnya. Yemelyanenko, *supra* note 48. Also, the Estonian parliament urged its government to recognize Chechnya "at the first available opportunity as soon as the international situation makes it possible." *Russian Duma Condemns Estonian Support for Chechnya*, Reuters World Service, Feb. 15, 1995, available in LEXIS, News Library, REUWLD File.

84. Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention]. Despite the fact that the Montevideo Convention was an Inter-American treaty, many international jurists recognize it as the basic list of criteria for statehood. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 13 (1963); States, Territories, and Governments, 1 *Whiteman Digest* § 14, at 230 (quoting Philip C. Jessup, as U.S. Representative to the U.N. Security Council, Dec. 2, 1948).

85. See *supra* note 24 and accompanying text.

86. See *supra* note 23 and accompanying text. The only time the Chechens have not lived in Chechnya was when they were forcibly deported by Stalin. See *supra* note 35 and accompanying text.

87. Ormrod, *supra* note 55, at 103 (pointing out that "Chechens express pride in their aggressive resistance to Russian encroachment and in their retention of their language and culture in the face of pressure to assimilate."). *Id.*

88. See *supra* notes 25-28 and accompanying text. "The Chechens longed for the day when they could be free from Russian domination and be able to exercise their God-given right of self-determination. When Communist Russia collapsed, they saw a window of opportunity to fulfill their long-awaited dream of independence." *Hearings*, *supra* note 20, at 10 (quoting Mohammed Shashani, President, Chechen-Ingush Society of America).

89. HENKIN ET AL., *supra* note 81, at 248.

90. States, Territories, and Governments, *supra* note 84 at 231. See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 73 (4th ed. 1990) (discussing the recognition of Albania in 1913, despite

Despite the fact that Chechnya's borders are not completely fixed, it still meets the requirement of a defined territory because before the Russian invasion, from November 2, 1991 until December 11, 1994, the Chechen government had complete political and military control over some land.⁹¹ Further, on July 23, 1993, "the Presidents of the Chechen Republic and the Ingush Republic signed a treaty 'On the Principles for Determining the Boundaries of [the Republics'] Territories.'"⁹² Even though in the treaty the parties pledge "not to establish a state border between Chechnya and Ingushetia,"⁹³ the existence of the treaty demonstrates that Ingushetia recognizes that Chechnya has territory. As a result of these factors, it is evident that Chechnya meets the second requirement of statehood.

Third, in order to satisfy the requirement of effective government, a stable political organization must be created in which the public authorities have become strong enough to assert themselves throughout the territories of the State.⁹⁴ Further, this standard is applied stringently to a State formed by secession.⁹⁵ After the declaration of independence in 1991, Chechnya possessed all the organs necessary to have an effective government. The office of the president, the parliament, and the court system had already been firmly established under Communism. Now, these bodies were simply operating under different names, free from the influence of Moscow.

One fact that seems to indicate a lack of effective government is the internal opposition to the Dudayev regime. However, until 1994, the Dudayev government was in complete control of Chechnya; and, while there was antagonism between the parliament and the president, this antagonism did not undermine the government's control of the country. In 1994, four different armed opposition groups rose up against Dudayev's regime, but the popularity

a lack of settled frontiers).

91. Occupation by a foreign power does not deprive a State of the criteria of territory and render it not a State. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. b (1986) [hereinafter RESTATEMENT]. Therefore, if it is shown that Chechnya meets the four criteria of the declaratory theory, it was not stripped of its Statehood by the subsequent Russian invasion. For example, Kuwait continued to be a State despite the Iraqi occupation in 1990. HENKIN ET AL., *supra* note 81, at 247.

92. Natalya Pachegina, *What Do We Need with that Sinking Ship Russia?*, NEZAVISIMAYA GAZETA, July 24, 1993, at 3 (condensed text), reprinted in 45 CURRENT DIG. OF THE POST-SOVIET PRESS, No. 30, at 29, available in LEXIS, News Library, CDSP File (Aug. 25, 1993).

93. *Id.*

94. 4 LEAGUE OF NATIONS O.J. Spec. Supp. 4, at 8-9 (1920) (Commission of Jurists on Aaland Islands Dispute).

95. James Crawford, *The Criteria for Statehood in International Law, 1976-1977* BRIT. Y.B. INT'L L. 93, 120.

of these groups was generally limited to their own native areas, and the total number of militia of all four groups was only 2,000 men.⁹⁶ Further, except for one joint push towards Grozny,⁹⁷ these groups never seriously challenged the Chechen government. Therefore, Chechnya has met the government requirement because the Dudayev government has been able to control the country effectively.⁹⁸

Finally, in addition to being able to assert itself domestically, a State must have "competence, within its own constitutional system, to conduct international relations with other States, as well as the political, technical and financial capabilities to do so."⁹⁹ The Chechen government has a foreign minister,¹⁰⁰ and it has demonstrated its ability to conduct foreign relations with other States through two events. First, the Chechen government negotiated and signed a treaty with the government of the Ingush Republic.¹⁰¹ Second, the fact that both Saudi Arabian King Fahd and the Emir of Kuwait, Jaber al-Ahmad as-Sabah, offered to establish diplomatic relations with Chechnya is evidence that at least these two countries believed the Chechen republic is capable of conducting foreign relations.¹⁰²

Based on the above analysis, Chechnya has met the four criteria of statehood. Consequently, Chechnya is a State. This finding differs from that of the constitutive theory. However, the finding of the declaratory theory trumps that of the constitutive theory because it carries more weight with the international legal community. Article 3 of the Montevideo Convention states that "[t]he political existence of a State is independent of recognition by the other States."¹⁰³ Further:

It is clear that an entity that meets the conditions of statehood cannot, because of the lack of recognition, be denied its rights or escape its obligations. "Its territory cannot be considered

96. PANICO, *supra* note 1, at 11-13. This number is a very rough approximation.

97. *Id.* at 13.

98. When the Russians invaded and the formal institutions of the Chechen government were unable to rule effectively, Chechnya was not rendered a non-state because a "breakdown of order through foreign invasion . . . [is] not considered to affect [the State's] personality." BROWNIE, *supra* note 90, at 73.

99. RESTATEMENT, *supra* note 91, at § 201 cmt. e.

100. Yemelyanenko, *supra* note 48. In 1993, Shamsutgin Yusef served in this capacity. *Id.*

101. Pachegina, *supra* note 92. "Delegations from the [United States], France, Belgium, Lebanon and Turkey were present at the treaty-signing ceremony." *Id.*

102. Yemelyanenko, *supra* note 48. General Dudayev turned down these proposals maintaining that Russia must first recognize Chechnya. *Id.*

103. Montevideo Convention, *supra* note 84, at art. 3.

to be no-man's-land; there is no right to overfly without permission; ships flying its flag cannot be considered stateless, and so on."¹⁰⁴

The conclusion that Chechnya is a State is strengthened in light of current events. In September 1996, Aleksandr Lebed and then-Chechen separatist Chief of Staff Aslan Maskhadov signed a peace agreement.¹⁰⁵ The terms of this agreement called for the status of Chechnya to be resolved before December 31, 2001, and in vague language it suggests "that the Chechen people will be able to determine their own future in accordance with the 'norms of international law,'"¹⁰⁶ The wording of this document has alarmed many Russians because "Chechnya's future status is to be defined by international law, not the Russian Constitution."¹⁰⁷ Many Chechens have argued that Chechnya is outside the jurisdiction of the Russian Federation. The Chechens did not participate in the referendum confirming the Russian constitution, and a vast majority of Chechens boycotted the July 1996 Russian presidential election.¹⁰⁸ Now, with the reference to international law, the Russians for the first time seem to acknowledge that Chechnya is outside of their jurisdiction.

Another aspect of the accord is that all Russian troops were to withdraw from Chechnya before January 27, 1997.¹⁰⁹ This action makes the excitement over the "international law" language in the treaty almost moot because, as some Russian commentators and Said-Khasan Abumuslimov, vice-president to Chechen President Zelimkhan Yandarbiyev, have pointed out, "[a] troop withdrawal . . . virtually assure[s] Chechen independence, whether Russia recognize[s] it or not."¹¹⁰ Indeed, since the signing of the peace accord, all

104. HENKIN ET AL., *supra* note 81, at 245 (quoting Nkambo Mugerwa, *Subjects of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 269 (Sorenson ed., 1968)). See also BROWNLIE, *supra* note 90, 88-91.

105. See Michael R. Gordon, *Chechen Peace Pact Draws Fire in Kremlin*, N.Y. TIMES, Sept. 3, 1996, at A11.

106. *Id.*

107. Paul Goble, *The Chechen War in Moscow*, N.Y. TIMES, Sept. 9, 1996, at A17.

108. Carlotta Gall, *Chechens Insist on Statehood*, MOSCOW TIMES, Aug. 20, 1996, available in LEXIS, News Library, MOSTMS File.

109. Michael R. Gordon, *Yeltsin Orders Withdrawal of Troops in Chechnya*, N.Y. TIMES, Nov. 24, 1996, § 1, at 4.

110. Gall, *supra* note 108; Vadim Makarenko, *Drawing Conclusions from the Chechen Experience: State Duma May Need to Create a Constitutional Mechanism for Secession from the Federation*, ROSSIISKIYE VESTI, Nov. 30, 1996, at 2 (condensed text), reprinted in 48 CURRENT DIG. OF THE POST-SOVIET PRESS, no. 48, at 16, available in LEXIS, News Library, CDSP File (Dec. 25, 1996).

signs of the "puppet government installed by Moscow [have] vanished," and "[t]he traditional green Chechen flag of the lone wolf flies over every battle-scarred town hall in the shattered republic."¹¹¹

Also, certain members of the international community have become more open in their acceptance of Chechnya as an entity apart from Russia. Pakistan, Jordan, and Iran "have each sent emissaries and cash to help guide the republic"¹¹² The Chechen government has opened a "mission" in Turkey, which is an embassy in all but name, and it plans to open several other official "missions" soon in Jordan and the Baltic Republics.¹¹³ In Warsaw, the Chechen government opened a new Chechen Information Center at which "Polish political figures played an active role in a so-called Chechen flag-raising ceremony."¹¹⁴

The last and most recent event that demonstrates Chechen statehood is the free elections that were held in Chechnya in January 1997.¹¹⁵ With these elections, the people selected a new president and parliament--graphically illustrating to the world that they do possess the governmental organs necessary to be a State. The new Chechen President, Aslan Maskhadov, has vowed to settle for nothing less than full independence from Russia, and he has the overwhelming support of the Chechen people behind him.¹¹⁶

In addition to its compliance with the four criteria of the declaratory theory and the added perspective of current events, the concept of self-determination bolsters Chechnya's claim of statehood. The concept of a right to self-determination is embodied in articles 1 and 55 of the U.N. Charter "as the principle of 'equal rights and self-determination of peoples.'"¹¹⁷ Over the years, other documents expressed the idea with greater clarity. In the *Declaration on Principles of International Law concerning Friendly Relations*

111. Michael Specter, *In War-Ravaged Chechnya, Russia's Presence Is Fading*, N.Y. TIMES, Nov. 1, 1996, at A1.

112. *Id.*

113. Gennady Charodeyev, *Flag of Ichkeria Over the Bosphorus?*, IZVESTIA, Dec. 4, 1996, at 3 (condensed text), reprinted in 48 CURRENT DIG. OF THE POST-SOVIET PRESS, no. 49, at 22, available in LEXIS, News Library, CDSP File (Jan. 1, 1997).

114. Leonid Kornilov, *Chechen Flag Raised Over Warsaw: Move Angers Moscow and Could Have Serious Complications*, IZVESTIA, Dec. 15, 1996, at 1, 3 (condensed text), reprinted in 48 CURRENT DIG. OF THE POST-SOVIET PRESS, no. 50, at 22, available in LEXIS, News Library, CDSP File (Jan. 8, 1997).

115. Alessandra Stanley, *Military Chief in Chechnya Says He Won Presidency*, N.Y. TIMES, Jan. 29, 1997, at A4.

116. *Id.*

117. Frederic L. Kirgis, Jr., *The Degrees of Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 304 (1994) [hereinafter Kirgis, *Degrees of Determination*].

and Co-operation among States (*Declaration on Friendly Relations*), the U.N. General Assembly stated:

[The] subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of self-determination], as well as a denial of fundamental human rights [T]he emergence into any . . . political status freely determined by a people constitute[s] [a] [mode] of implementing the right of self-determination by that people. Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence.¹¹⁸

Despite the drafters' strong statements regarding the right to self-determination, however, they were careful to add that the disruption of the territorial integrity of States was not encouraged. To this end, they put forth the following disclaimer:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹¹⁹

118. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*].

119. *Id.* Several other documents have concurred with the sentiments of this disclaimer. See *Vienna Declaration and Programme of Action*, pt. I, at 3, U.N. Doc. A/CONF. 157/24 (1993) [hereinafter *Vienna Declaration*].

In other words, according to the *Declaration on Friendly Relations*, a group only has a right to self-determination if the government of the territory fails to represent the whole people without distinction as to race, creed, or color.¹²⁰

The *Declaration on Friendly Relations* and the other documents pertaining to self-determination are non-binding instruments. Nevertheless, Frederic Kirgis contends that "they purport to, and probably do, reflect an *opinio juris*. In the human rights field, a strong showing of *opinio juris* may overcome a weak demonstration of state practice to establish a customary rule."¹²¹ Further, it is widely held that "the right to be free from alien colonial control is an established rule of international law."¹²² However, whether the concept of self-determination applies to Chechnya and whether Chechnya can avoid the disclaimer clause of the *Declaration on Friendly Relations* is not as clear. Therefore, in order to determine if the Chechen people have a right to self-determination, I will evaluate Chechnya's claim using Kirgis' analytical model.

According to Kirgis, who identified the key variables in the *Declaration on Friendly Relations* and the 1993 *Vienna Declaration*, whether a people have a recognizable claim to self-determination depends on the representativeness of the current government and the degree of destabilization the recognition would cause.¹²³ The relationship between these two variables is depicted by the graph in Figure 1.

120. The disclaimer embodied in the *Vienna Declaration* broadened "without distinction as to race, creed, or color" to "without distinction of any kind." *Vienna Declaration*, *supra* note 119, at 22.

121. Kirgis, *Degrees of Determination*, *supra* note 117, at 306; see also Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987). But see Coll, *supra* note 79; D'Amato, *supra* note 80; Franck, *supra* note 80; Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, & General Principles* 1988-1989 AUSTL. Y.B. INT'L L. 82, 89.

122. Kirgis, *Degrees of Determination*, *supra* note 117, at 308.

123. *Id.* at 308-10.

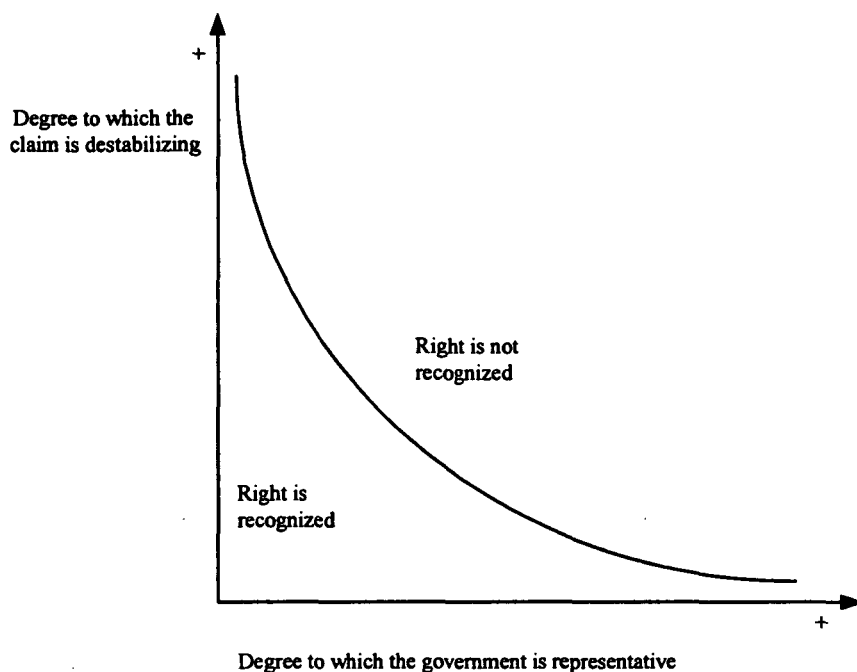


FIGURE 1. LEGITIMACY OF SELF-DETERMINATION CLAIMS¹²⁴

The vertical axis measures “the degree to which a particular self-determination claim is destabilizing, . . . based on circumstances and experience at the time when the claim is made,” while the horizontal axis measures “the degree to which the particular government is representative, . . . essentially a question of fact.”¹²⁵ The point where the degrees of destabilization and government representativeness intersect determines whether Chechnya has a recognizable claim of self-determination.¹²⁶

With regard to the first factor, a Chechen right to self-determination could greatly destabilize the Caucasus region. This region contains three independent States, Azerbaijan, Armenia, and Georgia, and several smaller

124. This graph is a copy of the graph Kirgis used in his article. *Id.* at 309.

125. *Id.*

126. *Id.*

autonomous republics, like Chechnya.¹²⁷ Further, it is home for “dozens of peoples, many with their own distinct languages.”¹²⁸ This fact has created the strong possibility that Chechen self-determination will lead to the “Balkanization” of the Russian Federation.¹²⁹ Many of these peoples were “colonized” at the same time as Chechnya, and have also at times vigorously resisted Russian control.¹³⁰

Another reason it is likely that Chechen self-determination will destabilize the area is that Stalin drew many of the current borders with the intent to dilute rather than unite local populations.¹³¹ Compounding that problem, a great number of Slavs also live in this region, and frequently they live in areas where the majority of the inhabitants are of another ethnic background. Consequently, a situation like the one in the former Yugoslavia could arise in which the Slavic minority groups would break away from already established States, like Azerbaijan, leading to the total fragmentation of the area.¹³² In response to this possibility, James Collins, Senior Coordinator in the Office of

127. Anthony Hyman, *Chechnya: War and Human Rights*, Crosslines: Global Rep. (1995) <http://carryon.oneworld.org/crosslines/crosslines_redarmy.html> (on file with author).

128. *Id.*

129. *Id.* Recently, events in the Caucasus have lent greater credence to the potential “Balkanization” of the Russian Federation and the surrounding republics. See Dmitry Kamyshev, *The Chechen Example Could Become Contagious*, KOMMERSANT-DAILY, Nov. 20, 1996, at 1, 3 (condensed text), reprinted in CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 25, 1996, vol. XLVIII, no. 47, at 15, available in LEXIS, News Library, CDSP File (discussing the Balkar national congress’s announcement of the formation of the sovereign Republic of Balkaria within Russia); Aleksandr Koretsky & Georgy Dvali, *Former Soviet Colony in the Role of a Mini-Empire*, KOMMERSANT-DAILY, Nov. 18, 1996, at 4 (condensed text), reprinted in CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 18, 1996, vol. XLVIII, no. 47, at 20, available in LEXIS, News Library, CDSP File (pointing out that the stubborn Chechen resistance encourages other national groups to solve their problems through armed resistance and without concession); *The War in Chechnya Is Over. Is Dagestan Next?*, NEZAVISIMAYA GAZETA, Nov. 19, 1996, at 1, 3 (excerpts), reprinted in CURRENT DIG. OF THE POST-SOVIET PRESS, Dec. 11, 1996, vol. XLVIII, no. 46, at 15, available in LEXIS, News Library, CDSP File (identifying communist leader Gennady Zyuganov’s concerns regarding the spread of violence from Chechnya into Dagestan). One should note, however, that the economic and resource dependencies that exist between the periphery areas and the Russian center serve as a deterrent to “Balkanization.” See KAREN DAWISHA & BRUCE PARROTT, *RUSSIA AND THE NEW STATES OF EURASIA: THE POLITICS OF UPHEAVAL* (1994) (illustrating the lingering dependencies that exist between the Newly Independent States and Russia).

130. See generally Ommrod, *supra* note 55 (discussing the history of each of the national groups in the North Caucasus region).

131. Erlanger, *supra* note 17, at A14.

132. Recently, this fear came close to being realized when “Viktor Zaitsev, a member of the Terek Cossacks in Russia’s southern Stavropol region, [warned] . . . that his people consider the northern part of Chechnya their own land . . .” Zaitsev said, “We will fight for it just like the Chechens have fought for land they regard as their own, with mothers and children holding hunting rifles.” Dmitry Zaks, *Cossack Representative Asserts Will to Defend Chechen Land*, MOSCOW TIMES, Jan. 18, 1997, available in LEXIS, News Library, MOSTMS File.

the Ambassador-at-Large for the New Independent States, warned, "If open to a sort of absolute principle that any people has a right to its own state, a part of the world may begin to unravel in a way which I think has no foreseeable end and is very dangerous."¹³³ Similarly, former U.N. Secretary General Boutros Boutros-Ghali stated that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."¹³⁴ In summary, recognizing the Chechen claim to self-determination could be extremely destabilizing. However, where Chechnya lies in relation to the curve in Kirgis' model cannot be determined until the representativeness of the Russian government is evaluated.

There is a great deal of evidence which illustrates that the Russian government does not represent the concerns of the Chechen people. First, like the territories of the colonial era at which the *Declaration of Friendly Relations* is aimed, the Chechens were a subjugated people. Imperial Russia was not concerned with the needs and desires of the Chechens. Consequently, the Russian government did not represent these needs. Second, the continual wars of independence which the Chechens fought against the Russians are *prima facie* evidence that the Russians were not adequately representing the Chechens. If they were, then it is more likely than not that the continual cycle of fighting would not have occurred.

Third, the way the Russians treated the Chechens illustrates that the government does not represent them. In Chechnya, when the Russians were in control, the Chechen people were the victims of widespread job and educational discrimination. Further, they were under-employed in the skilled trades and utilized primarily as migrant farmers.¹³⁵ In Russia, the Chechens and other ethnic groups from the Caucasus are frequently viewed as inferior or as criminals.¹³⁶ Many Russians refer derogatorily to the people of the Caucasus as *chornye*, "blacks,"¹³⁷ and members of conservative Russian organizations consider them to be a desecration to basic Russian values.¹³⁸ This general sentiment against the Chechens and other similar ethnic groups

133. *Hearings*, *supra* note 20, at 63 (statement of James F. Collins, Senior Coordinator in the Office of the Ambassador-at-Large for the New Independent States).

134. *Agenda for Peace*, U.N. Doc. S/24111, ¶ 17 (1992) (Boutros Boutros-Ghali).

135. PANICO, *supra* note 1, at 4.

136. *Hearings*, *supra* note 20, at 88-89 (prepared testimony of Paul A. Goble, Senior Associate, Carnegie Endowment for International Peace).

137. HANDELMAN, *supra* note 37, at 302.

138. *Id.*

has translated into direct government action. In October 1993, the Russian government launched "Operation Signal" in Moscow. The purpose of this joint police and military operation was to crackdown on crime. However, contrary to its stated purpose, the action led to the expulsion of numerous dark-skinned persons.¹³⁹ According to human rights activists, anyone who looked non-Russian had become a target, and Steven Handelman described the operation as giving "full expression to Russian frustration over rising crime, not to mention simmering xenophobia and racial prejudice."¹⁴⁰

As the evidence above illustrates, the Russian government does not represent the concerns of the Chechen people. Consequently, I maintain, contrary to general international opinion,¹⁴¹ that Chechnya has a recognizable claim of self-determination. In other words, with regard to the graph below, I contend that it is possible that Chechnya is located beneath the curve. This conclusion is warranted because, based on the evidence above, it is reasonable to assume that the Russian government is less representative than a hypothetical average State government. On balance, this low level of representativeness compensates for the fact that Chechnya's claim of sovereignty is more destabilizing than a hypothetical average claim of sovereignty. As a result of this assumption, Chechnya may be located beneath the curve because it lies in the range represented by the gray square below. Therefore, as Figure 2 depicts, Chechnya has a recognizable claim of self-determination because of the unrepresentative nature of the Russian government.

139. *See id.* at 290.

140. *Id.* Operation Signal was not a singular event. Another expulsion took place in the summer of 1994. Both of these actions constituted violations of human rights severe enough for the U.S. government to express strong concern. *Hearings, supra* note 20, at 106 (answers of James F. Collins, Senior Coordinator in the Office of the Ambassador-at-Large for the New Independent States, to questions for the record submitted by Chairman Smith).

141. *See supra* notes 14-17 and accompanying text.

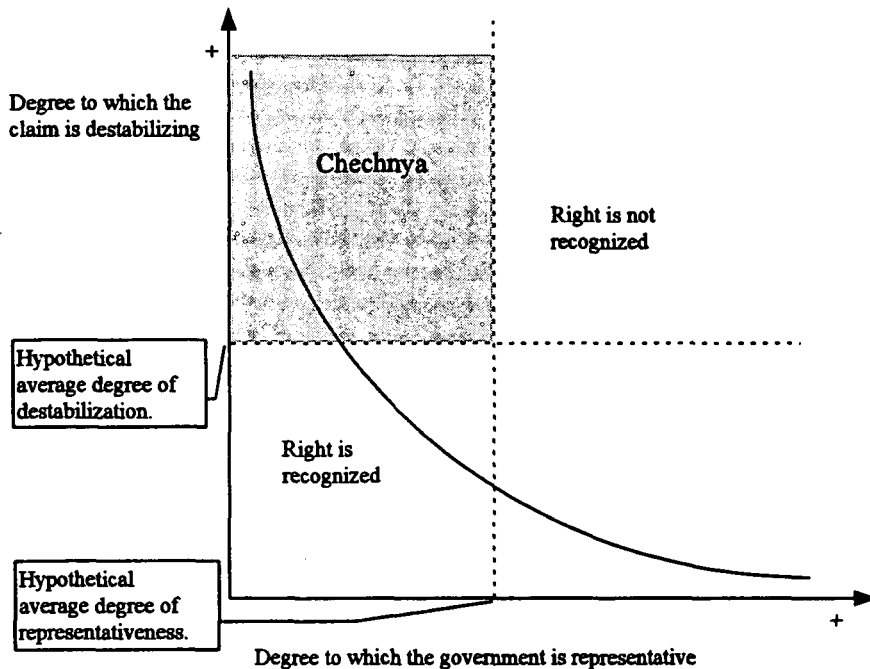


FIGURE 2. CHECHNYA'S SELF-DETERMINATION CLAIM¹⁴²

Moreover, Chechnya's recognizable claim of sovereignty is bolstered by the following three arguments. First, the situation in Chechnya is similar to that of the instances of colonial domination which occurred in Africa, Asia, and the Caribbean because Russia and the Soviet Union subjugated the Chechen people through military means and exploited the territory for its strategic and economic value.¹⁴³ Therefore, the right to be free from alien control, a customary rule of international law,¹⁴⁴ should apply, even though Chechnya is trying to secede from within the currently recognized territory of

142. This graph and the lines and points on it are not based on statistical evidence or specific factual research. Rather, it is merely a visual aid to assist the reader and demonstrate that it is possible that Chechnya's claim of self-determination is recognizable.

143. See *supra* notes 22-39, 47 and accompanying text.

144. Kirgis, *Degrees of Determination*, *supra* note 117, at 308.

Russia. Second, as demonstrated by the facts above, the disclaimer provision in the *Declaration on Friendly Relations* does not apply to Chechnya. The government of Russia does not represent "the whole people belonging to the territory without distinction as to race, creed or colour."¹⁴⁵ Third, international precedent indicates that Chechnya has a right to self-determination. Both the European Union (E.U.) and the United States recognized the new States of the former Yugoslavia.¹⁴⁶ This recognition implicitly condoned their right to self-determination. In the former Yugoslavia, the potential for violent destabilization was just as obvious as in the case of Chechnya, especially because at the time the E.U. and the United States recognized Bosnia, fighting had already erupted in Slovenia and Croatia. Based on these precedents, one could contend that Chechnya has a recognizable right to self-determination.

In summary, due to the fact that Chechnya has satisfied the four criteria of the declaratory theory; and due to its arguably recognizable claim of self-determination, the conflict in Chechnya has met the first requirement of article 2(4). The Chechen conflict is a war between States.¹⁴⁷

2. *A Use of Force?*

In addition to being a conflict between States, in order for article 2(4) to apply there must be a "threat or use of force against the territorial integrity or political independence of any state"¹⁴⁸ Since Chechnya declared its independence, there have been five Russian actions that may be classified as violations of customary international law. In the following discussion, I examine each of these events and determine not only if they constitute a threat or a use of force according to article 2(4), but also if these actions were armed attacks entitling the Chechens to a right of self-defense under article 51.¹⁴⁹

First, on November 2, 1991, shortly after Dudayev declared Chechen independence, Russian President Boris Yeltsin sent 650 troops to Chechnya

145. *Declaration on Friendly Relations*, *supra* note 118, at 124. The disclaimer definitely does not apply if the broader *Vienna Declaration* terms are used. See *supra* note 120 and accompanying text.

146. HENKIN ET AL., *supra* note 81, at 252-53.

147. For other analyses of whether Chechnya is a State, see Hollis, *supra* note 20, at 815-16 (finding that under the declarative view, Chechnya has a legitimate claim of Statehood); Trent N. Tappe, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L. L. 255 (1995) (finding that Chechnya's claim to Statehood is valid).

148. U.N. CHARTER art. 2, ¶ 4.

149. U.N. CHARTER art. 51.

to restore order.¹⁵⁰ These troops arrived in Grozny, but they did not leave their camps. Nine days later, they returned to Russia.¹⁵¹ This action can be classified as a use of force. The Russian troops violated the territorial integrity of Chechnya. In addition, article 3(a) of the Definition of Aggression states that "[t]he invasion . . . by the armed forces of a State of the territory of another State" is an act of aggression (a use of force).¹⁵² The Russian action was an invasion because the Russian soldiers were sent there with the express intent to deprive Chechnya of its political independence.

The Russian action was also an armed attack. In *Nicaragua v. U.S.*, the I.C.J. maintained that an armed attack occurs when a State sends its regular armed forces across an international border.¹⁵³ The deployment of troops into the outskirts of the capital of an independent State meets the definition of an armed attack given by the I.C.J. However, since the Chechen right to self-defense must be proportional to the Russian violation,¹⁵⁴ its right to respond was limited.¹⁵⁵

The next action the Russian government took was to fund and supply the armed opposition groups in Chechnya from 1993-94. In *Nicaragua v. U.S.*, the I.C.J. stated that "assistance to rebels in the form of the provision of weapons or logistical or other support [does not constitute an armed attack. Rather, s]uch assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."¹⁵⁶ The determination of whether it is a use of force or intervention depends on the scope of the assistance.¹⁵⁷ In *Nicaragua v. U.S.*, Nicaragua accused the United States of "recruiting, training, arming, equipping, financing, supplying and . . . directing military and paramilitary actions" against the Nicaraguan government.¹⁵⁸ Concerning these claims, the court found that the United States

150. One potential counter argument to my analysis is that Chechen statehood had not solidified when Russian troops were deployed to Grozny in 1991. While the exact moment when Chechnya "became" a State is impossible to identify, the fact that the Chechen government was able to mount a defense and repel the Russian incursion illustrates that the Chechen government was in control of the people and the territory at this time. Other evidence that the Chechen declaration of independence created a State can be found in current events. See *supra* notes 105-16 and accompanying text.

151. See *supra* notes 45-46 and accompanying text.

152. *Definition of Aggression*, *supra* note 75, at 143 (art. 3, ¶ a).

153. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), at 103 (¶ 195).

154. *Id.* at 94 (¶ 175).

155. In this instance, the Chechen threat to shoot any Russian soldiers who left their camps was a proportional and legitimate response. See *supra* note 46 and accompanying text.

156. *Military and Paramilitary Activities*, 1986 I.C.J. at 104 (¶ 195).

157. Fidler, *supra* note 8, at 68.

158. *Military and Paramilitary Activities*, 1986 I.C.J. at 18 (¶ 15, sub-¶. a).

had supplied aid to the rebels (Contras),¹⁵⁹ and it held that the United States assistance constituted an intervention into the internal affairs of Nicaragua. However, it was not a use of force.¹⁶⁰

In the case of Chechnya, the Russian aid given to the anti-Dudayev opposition groups was in some ways greater than the aid the United States gave to the Contras. The Russians supplied the rebels with large sums of money and military hardware, including helicopters;¹⁶¹ but, like the situation in Nicaragua, the Chechen rebels were not dependent on Russian aid. Moreover, the assistance was not enough to turn the tide of the conflict in the favor of the rebels.¹⁶² Consequently, based on the precedent of the *Nicaragua* case, the Russian support of the Chechen opposition groups was not a use of force. Instead, it constituted an intervention into the internal affairs of Chechnya.

Over time, however, the nature of the Russian involvement with the Chechen opposition groups changed. By August of 1994, it had escalated to the point where it was no longer a mere intervention. Instead, it constituted a separate action. Around this date, helicopter gunships exclusive to the Russian military began engaging targets in Chechnya.¹⁶³ Shortly thereafter, Dudayev's forces captured at least seventy Russian soldiers in Grozny, and the Russian newspaper *Izvestiya* exposed them as active-duty Russian army personnel who had been recruited by the FSK.¹⁶⁴

Unlike the Russian government's earlier involvement with the Chechen opposition groups, this action was undeniably a use of force in violation of customary international law. Moreover, it was an armed attack. In *Nicaragua v. U.S.*, the I.C.J. stated that a violation of article 3(g) of the Definition of Aggression constituted an armed attack and violated customary international law.¹⁶⁵ In other words, an armed attack occurs when "a state organizes, equips, and sends armed bands into another state's territory that, because of the scale and impact of the military activity, would be an armed attack if undertaken by regular military forces."¹⁶⁶ In this instance, the Russian soldiers signed a

159. *Id.* at 62-63 (¶¶ 110-12).

160. *Id.* at 119 (¶ 228).

161. PANICO, *supra* note 1, at 12-14.

162. *Id.* at 10.

163. *See supra* note 56 and accompanying text.

164. *See supra* note 58 and accompanying text.

165. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), at 103 (¶ 195).

166. Fidler, *supra* note 8, at 68.

contract with the FSK, a branch of the Russian government.¹⁶⁷ The FSK then equipped the men and sent them to Chechnya where they staged an armor assault on Grozny, an action which would clearly constitute an armed attack if undertaken by regular military forces.

Because this action was an armed attack, Chechnya had a right to self-defense, as long as it was necessary and proportional. The Chechen use of force was justified because it was necessary to defend Grozny and it was proportional to the force against which it was used. However, after the capture of the soldiers, Dudayev threatened to kill them unless Moscow recognized that they were Russian troops.¹⁶⁸ This threat by Dudayev was not justified as self-defense because it was not necessary. The attack had been repelled. Further, the argument that it was necessary to threaten the lives of the soldiers in order to expose the Russian participation in the conflict to the world and to deter future involvement is not valid because anticipatory self-defense is limited by the standard enunciated in the *Caroline Case*, and Dudayev's actions did not meet this standard.¹⁶⁹ Therefore, the Chechen threat could not be justified as self-defense, but that fact does not mean that it was an illegal threat of force.

According to Brownlie, "[i]f the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal."¹⁷⁰ Further, Oscar Schachter has stated, "A blatant and direct threat of force to compel another State to yield territory or make substantial political concessions (not required by law) would have to be seen as illegal under Article 2(4), if the words 'threat of force' are to have any meaning."¹⁷¹ In the case at hand, Dudayev threatened to use force against soldiers in order to

167. PANICO, *supra* note 1, at 15. NTV, an independent television broadcast company, interviewed three of the captured soldiers who said, "[w]e signed a contract through the FSK." *Id.* Many others left letters which acknowledged these contracts. *Id.*

168. See *supra* note 57 and accompanying text.

169. Max Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634-35 (1982). After the Israeli attack on the Iraqi nuclear reactor in 1981, several delegates to the U.N. Security Council rejected Israel's anticipatory self-defense argument based on the fact that it did not meet the requirements for self-defense found in the *Caroline Case*. *Id.* Schachter maintains that in 1842, U.S. Secretary of State Daniel Webster, in a diplomatic note to the British, expressed the conditions of the right to anticipatory self-defense when he asserted that self-defense was permissible when "the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." *Id.* With regard to Dudayev's threat, it was not justifiable as an act of self-defense because its necessity was not instant, overwhelming, and leaving no choice. Rather than threaten the lives of the men, Dudayev could have pursued numerous other policy options.

170. BROWNIE, *supra* note 8, at 364, 431.

171. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 111 (1991).

compel Russia to concede that the soldiers were members of the Russian army. This threat required Russia to act against its interests and recognize the troops. Consequently, it was adverse to Russia's political independence. Nevertheless, it is still not clear that Dudayev's actions violated article 2(4) because at the time of his comments a use of force against the prisoners may have been justified.

According to the 1949 Geneva Convention III and articles 43-47 of Additional Protocol I of 1977, captors must afford special treatment and protection to prisoners of war.¹⁷² However, these rules do not extend to mercenaries.¹⁷³ At the time Dudayev threatened to kill the soldiers, the Russian government disavowed any responsibility for the prisoners' activities. In fact, Russia maintained that the men were mercenaries.¹⁷⁴ Thus, Dudayev's comments did not constitute an illegal threat of force because the captured soldiers were "mercenaries," and the Chechen government would have been fully within its rights to try them according to Islamic law and sentence them to death.

The fourth Russian action that may have constituted an illegal threat of force took place on November 29, 1994 when Yeltsin massed troops on Chechnya's borders and threatened to use force if Dudayev did not disband his armed forces and release all prisoners within forty-eight hours.¹⁷⁵ This threat was an illegal threat to use force under article 2(4) because it directly endangered both Chechnya's territorial integrity and its political independence. With regard to whether this threat constituted an armed attack, it obviously did not. Nevertheless, it still may have given the Chechens a right to self-defense. The international legal status of anticipatory self-defense is unclear,¹⁷⁶ but while there is no established consensus in support of the permissibility of anticipatory self-defense, "there is certainly not a consensus opposed to it."¹⁷⁷ Further, it is unrealistic to expect that a country will wait before taking action when enemy forces are massing at its borders. Thus, in 1967, when Egyptian

172. HILAIRE MCCOUMBREY & NIGEL WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 268 (1992).

173. *Id.* at 269.

174. Michael Specter, *Yeltsin Threatens Action on Warring Secessionist Area*, N.Y. TIMES, Nov. 30, 1994, at A3.

175. PANICO, *supra* note 1, at 15.

176. See AREND & BECK, *supra* note 73, at 72-79, 259-60 n.45.

177. *Id.* at 79.

President Gamal Abdel Nasser announced the blockade of the Gulf of Aqaba and Israel attacked, the international community's reaction was mixed.¹⁷⁸

In the case of Chechnya, at the time of the threat, Russian forces were massing at the Chechen border.¹⁷⁹ Yeltsin's threat reinforced the general perception that these forces were not massing on the border for peaceful purposes. Therefore, in line with the Israeli attack in 1967, a Chechen attack on the Russian forces after the threat may have been justified. Regardless, Yeltsin's threat was illegal under customary international law.

The final Russian action obviously was an illegal use of force under article 2(4) and an armed attack. On December 11, 1994, Russian troops moved into Chechnya and advanced on Grozny, thereby infringing on Chechnya's territorial integrity and political independence. The Russian assault was a clear act of aggression and violated numerous provisions of the *Definition of Aggression*.¹⁸⁰ As a result of this assault, the Russian government provided the international community with an incontrovertible example of its use of force in Chechnya.

In summary, of the five Russian actions analyzed above, four constituted illegal threats or uses of force, and three of those four were serious enough to be deemed armed attacks. Despite the Russian actions, however, the international community has not tried to apply the principles of *jus ad bellum* to Russia. Instead, it has adhered firmly to the position that Chechnya is an internal affair; and, as a result, world leaders have had no occasion to apply the rules.¹⁸¹ However, in light of the above arguments, it should be clear that the issue is not black and white. Therefore, there must be other considerations behind the international community's decision.

III. THE INTERNATIONAL COMMUNITY'S GAMBLE

A. *Weighing the Odds*

178. ANTONIO CASSESE, *VIOLENCE AND LAW IN THE MODERN AGE* 36 (S.J.K. Greenleaves trans., 1988). See also Richard N. Gardner, *Commentary on the Law of Self-Defense*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (Lori Fisler Damrosch & David Scheffer eds., 1991). Gardner states, "I think most people felt that [the Israeli attack in 1967] was justified self-defense." *Id.* at 51-52.

179. Sheets, *supra* note 57.

180. *Definition of Aggression*, *supra* note 75. Specifically, the Russian assault violated paragraphs a, b, d & e of article 3 of the *Definition of Aggression*. *Id.* at 142.

181. See *supra* notes 14-17 and accompanying text.

When making their decision whether to apply the principles of *jus ad bellum*, world leaders had more to consider than simply if Chechnya met the four requirements of the declaratory theory. In particular, members of the international community, especially the United States and the E.U., had to worry about their relationship with Russia and the stability of the Caucasus region.

After the collapse of Communism in the former Soviet Union, Russia tried to rejuvenate its crippled economy by embracing capitalism and democracy. Today, while Russia's economy shows signs of future improvement,¹⁸² the country is currently suffering from soaring poverty, crime, corruption,¹⁸³ and a genuine lack of leadership.¹⁸⁴ As a result of these problems, the Russian people "believe the government has much to answer for."¹⁸⁵ While some commentators have asserted that a return to a more authoritarian government in Russia is farfetched,¹⁸⁶ the Communists did win in almost every region of Russia in the December 1995 State Duma election;¹⁸⁷ and in the July 1996 Presidential election, the Communists received forty percent of the vote.¹⁸⁸ These election results indicate that a large portion of the population are *derzhavniki*, or proponents of a strong State.¹⁸⁹

With regard to Chechnya, Moscow has consistently maintained that it is an internal matter,¹⁹⁰ and the *derzhavniki* in the Russian government have stood firmly behind Yeltsin's decision to invade.¹⁹¹ If the members of the

182. David Remnick, *Can Russia Change?*, FOREIGN AFF., Jan.-Feb. 1997, at 35, 48 (discussing RICHARD LAYARD & JOHN PARKER, *THE COMING RUSSIAN BOOM: A GUIDE TO NEW MARKETS AND POLITICS* (1996)).

183. *Id.* at 37. See also Peter Daniel DiPaola, *The Criminal Time Bomb: An Examination of the Effect of the Russian Mafiya on the Newly Independent States of the Former Soviet Union*, 4 IND. J. GLOBAL LEGAL STUD. 145 (1996).

184. Russian President Boris Yeltsin has been ill and virtually incapacitated since he was reelected in July of 1996. His illness has left Russia without a dynamic leader. Michael Specter, *Rudderless Russia: Melancholy Mixes with Bravado*, N.Y. TIMES, Jan. 10, 1997, at A3. As Mikhail Gorbachev acknowledged, "[I]llness in power leads to danger." Remnick, *supra* note 182, at 44.

185. Remnick, *supra* note 182, at 37.

186. *Id.* at 48.

187. Michael Specter, *Anger Got the Votes*, N.Y. TIMES, Dec. 19, 1995, at A8.

188. *Russia's Daunting Future*, ECONOMIST, July 6, 1996, at 43.

189. Jack F. Matlock, Jr., *Dealing With a Russia in Turmoil*, FOREIGN AFF., May-June 1996, at 38, 42. "Russian nationalists, including communists, often describe themselves as *derzhavniki* . . ." *Id.*

190. Summarizing the Russian position on Chechnya, Valentin Kovalyov, deputy chairman of the State Duma, said, "I am against the internationalization of this conflict. It is an internal affair of the Russian state." Hecker, *supra* note 14.

191. *Hearings*, *supra* note 20, at 6 (statement of Dr. Elwna Bonner, President of the Sakharov Foundation).

international community were to accuse Russia of violating the principles of *jus ad bellum*, they would be explicitly recognizing Chechnya's declaration of independence because *jus ad bellum* only applies to State-to-State conflict. Further, recognition "would suggest to many Russians that America [and the rest of the international community] [are] determined to support the dismemberment of their country."¹⁹²

Such international sentiments would provide the *derzhavniki* in the Russian government a banner behind which to rally during election years.¹⁹³ The *derzhavniki* could portray the international condemnation as a violation of Russia's territorial integrity and its political independence. As a result, the other elements of the Russian government would be faced with a difficult decision. They could embrace the world community and accede to the secession of Chechnya, or they could turn away from the world community, join the *derzhavniki*, and defend Russia's territorial integrity. Due to the politically untenable nature of the first choice, it is more likely than not that the ranks of the *derzhavniki* would grow, and that Russia would alienate itself from the world community, thereby endangering its fledgling democracy and capitalist economy, as well as regional stability and security. Many of the countries of the international community have a vested interest in the success of the new Russian order. Therefore, it is unlikely that they would be willing to sacrifice that interest over Chechnya. Further, the world is especially unwilling to alienate Russia because of its formidable military and nuclear arsenal.

When deciding whether to apply the principles of *jus ad bellum*, another concern of the international community was the stability of the Caucasus region. As I discussed above, the region is very susceptible to fragmentation due to the presence of distinct ethnic groups, pockets of Slavic Russians, general antagonism, and borders which were drawn to dilute rather than unite local populations.¹⁹⁴ Coming on the heels of the bloody conflict following the disintegration of the former Socialist Federal Republic of Yugoslavia,¹⁹⁵ the

192. Matlock, *supra* note 189, at 51.

193. At the time the fighting in Chechnya broke out, two important Russian elections were looming: the December 1995 State Duma election and the June 1996 Russian Presidential election.

194. See *supra* notes 128-135 and accompanying text; Michael Specter, *Facing Election, Yeltsin Is Halting War on Chechens*, N.Y. TIMES, Apr. 1, 1996, at A1.

195. Within the first three years of fighting in Bosnia-Herzegovina alone, at least 200,000 civilians had perished and over one million others had become refugees. Craig R. Whitney, *Allies Give Provisional Yes to Air Strikes on the Serbs*, N.Y. TIMES, Apr. 21, 1994, at A5.

international community may have been hesitant to become involved in an area which strongly resembled the Balkans.

In the former Yugoslavia, the recognition of Croatia and Slovenia by the E.U. precipitated the outbreak of war.¹⁹⁶ Consequently, the similarities between Chechnya and the former Yugoslavia hold increased importance. First, both areas are inhabited by distinct ethnic groups who practice different religions. Second, these different ethnic groups have a history of antagonism. In the former Yugoslavia, this antagonism marked the relationships of all of the main ethnic groups,¹⁹⁷ while in the Caucasus region, it was principally focused against the Russian oppressors.¹⁹⁸ Third, conquerors imposed ethnic diversity on both regions via forced colonization and restructuring of borders.¹⁹⁹ Finally, the two areas resemble each other in that they were both recently released from the grip of authoritarian Communist governments. Due to these similarities and the recent fighting in the former Yugoslavia, it would seem that the possibility for violence and instability in the Caucasus region is great. To avoid such an outcome, many countries may have decided not to apply the principles of *jus ad bellum* to the conflict in Chechnya.

In summary, the fragile state of the Russian democracy and the potential for violence in the Caucasus made the application of *jus ad bellum* to the Chechen conflict potentially costly. However, in spite of the benefits of inaction, the decision to ignore the rules of war was not costless. Indeed, the international community had a great deal on the line.

B. Rolling the Dice

When the international community decided not to act in Chechnya it was taking a gamble. On the one hand, inaction had potential benefits. First, it

196. MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR 163-64* (1994).

197. For an overview of the history of ethnic tension in the Balkans, see Jasminka Udovički, *The Rise and Fall of the Balkan Idea, in YUGOSLAVIA'S ETHNIC NIGHTMARE: THE INSIDE STORY OF EUROPE'S UNFOLDING ORDEAL* 19 (Jasminka Udovički & James Ridgeway eds., 1995).

198. For a history of the antagonism between the Russians and the Chechens, see *supra* notes 29-36 and accompanying text.

199. In the Balkans, successive waves of conquerors would colonize friendly regions in an effort to create a buffer zone against future attacks. Udovički, *supra* note 197, at 19-20. Later, Marshal Josip Broz Tito, Communist leader of Yugoslavia, would pursue the policy of further fragmenting ethnic populations in order to increase their dependence on the central government. NORA BELOFF, *TITO'S FLAWED LEGACY* 248 (1985). Similarly, in the Caucasus, it was a common Tsarist strategy to settle Cossacks in the hostile territory. PANICO, *supra* note 1, at 3. Also, like Tito, Stalin tried to weaken ethnic groups by fragmenting them. Erlanger, *supra* note 17, at A14.

would not alienate Russia. Consequently, Russia's capitalist democracy was not jeopardized, and Russia preserved its potential of becoming a substantial trading partner. Second, the international community was not forced to face the issue of where to draw the line with regard to claims of self-determination. Again, as Boutros-Ghali stated, "[I]f every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."²⁰⁰ By not taking action in Chechnya, the international community avoided lowering the standard for what qualified as a valid claim; and, as a result, it escaped a potential slippery slope. Finally, by not acting, the international community did not have to risk further destabilizing the Caucasus.²⁰¹

On the other hand, however, the international community sacrificed the long-term benefit of an established rule of law on war. For centuries, the world has been embroiled in warfare because the rules of war are not enforced. Recently, in the Persian Gulf War, the actions of the United States and the coalition forces under the auspices of the U.N. enhanced the credibility of the principles of *jus ad bellum*.²⁰² In Chechnya, the international community had a chance to bolster the rule; but, instead, it chose to compromise the gains of the Persian Gulf War. By taking this action, it sent two undesirable messages. First, the international community communicated that it will apply the rules of war selectively. In other words, there is a sliding scale. Second, it announced that it is permissible to subjugate colonial people. Self-determination is not as important as stability and trade.

These two messages undermine the rule of law and international respect for the law. Further, they indicate that the international community is willing

200. *Agenda for Peace*, *supra* note 134, at ¶ 17.

201. The writings of Richard Holbrook, Assistant Secretary of State for European and Canadian Affairs, offer evidence that these concerns occupy the minds of world leaders. Holbrook stated, "[t]he Chechnya conflict, terrible though it is, has not changed the nature of U.S. interests. . . . If the forces of reform a[r]e embattled, the United States must reinforce, not retreat from, its support for them. The U.S. objective remains a healthy Russia—a democratic Russia pursuing reform and respecting the rights of its citizens, not fragmenting into ethnic conflict and civil war." Richard Holbrook, *America, A European Power*, FOREIGN AFF., Apr.-Mar. 1995, at 39, 49-50. See also Steven Erlanger, *Will State Dept. Rights Advocate Get a Bigger Role?*, N.Y. TIMES, Jan. 7, 1997, at A3. In this article, senior government officials acknowledge that issues like human rights often take a backseat to "arguments that countries like Saudi Arabia and Russia may be too fragile to weaken further by making human rights an overriding priority, outweighing America's thirst for oil, regional security or, as in Russia's case, the prospects for democracy itself." *Id.*

202. See Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452 (1991).

to sacrifice fairness and consistency for short term gains. As a result, they damage the possibility that there will ever be lasting peace in the international system.

CONCLUSION

Russia's actions in Chechnya have violated *jus ad bellum* and customary international law, but the rest of the world has chosen to look the other way. By turning its head, the world is taking a gamble. It has sacrificed an opportunity to strengthen the rule of law in international relations for the possibility of gaining a strong new partner with whom it can pursue peace. However, given Russia's apparent disregard for civilian casualties in Chechnya, it is far from clear that it will ever evolve into a true partner in peace. Nevertheless, the world has already placed its bet, and we must now hope that its horse comes in.

